84-219

No. -

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

CHARLES P. MORRIS, *et al.*,
Petitioners,

v.

PROVIDENCE HOSPITAL,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTION PRESENTED

Whether the exclusive remedy provision of the Longshoremen's and Harbor Workers' Compensation Act bars an employee from bringing a tort action against his employer, acting in a separate independent capacity, for negligent medical treatment.

PARTIES TO THE PROCEEDINGS

The parties to the proceedings below in the United States Court of Appeals for the District of Columbia Circuit were petitioners, Charles P. Morris and Henrietta Morris, and the respondent, Provdence Hospital.

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No. -

CHARLES P. MORRIS, *et al.*,
Petitioners,

v.

PROVIDENCE HOSPITAL,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners, Charles P. Morris and Henrietta Morris, respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit issued April 13, 1984.

OPINIONS BELOW

The memorandum opinion of the District of Columbia Court of Appeals dated January 31, 1983, is an unreported opinion (Appendix, p. 10a).

The memorandum opinion of the Honorable Louis Oberdorfer, Judge of the United States District Court for the District of Columbia, dated June 22, 1983, is an unreported opinion (Appendix, p. 3a).

The memorandum opinion of the United States Court of Appeals for the District of Columbia Circuit dated April 13, 1984, is an unreported opinion (Appendix, p. 1a).

JURISDICTIONAL STATEMENT

The judgment of the United States Court of Appeals for the District of Columbia Circuit was entered on April 13, 1984. Petitioners Charles P. Morris and Henrietta Morris' petition for rehearing *en banc* was denied on May 9, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

Section 5(a) of the Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 1427, 33 U.S.C. Section 905(a) (1973) made applicable to the District of Columbia by D.C. Code Section 36-501 (1973).

EXCLUSIVENESS OF REMEDY AND THIRD-PARTY LIABILITY

> SEC. 5(a) The liability of an employer prescribed in section 4 shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an employer

> fails to secure payment of compensation as required by this Act, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under the Act, or to maintain an action at law or in admiralty for damages on account of such injury or death. In such action the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, or that the employee assumed the risk of his employment, or that the injury was due to the contributory negligence of the employee.

STATEMENT OF THE CASE

The petitioner, Charles Morris, was employed as a chauffeur by the respondent, Providence Hospital (Providence). In April of 1980, Mr. Morris sustained a mild back strain while at work. During the two-and-one half weeks that followed, Mr. Morris received medical treatment for this minor back strain from Providence. Mr. Morris was treated as an outpatient at Providence and was billed for the medical services which he received. These bills were ultimately paid by the employer's insurance carrier.

During the course of Mr. Morris' treatment, traction was applied to the strain to alleviate pain. Mr. Morris' pain did not subside but became more severe and incapacitating. By April 18, 1980, Mr. Morris had lost the ability to walk. Immediate surgery was performed by Providence, which failed to correct his problem. Mr. Morris is now permanently paralyzed from the waist down with complete loss of bowel and bladder control.

The complaint in this case was filed on June 25, 1981, in the Superior Court for the District of Columbia. The

plaintiffs, Charles and Henrietta Morris, sued the employer, Providence, for medical malpractice. *Morris v. Providence Hospital,* C.A. 9449-81 (June 25, 1981). Plaintiffs' complaint was dismissed on defendant's motion by the Honorable Sylvia Bacon on January 5, 1982. Judge Bacon relied on *Lindsay v. George Washington University,* 108 U.S. App. D.C. 44, 279 F.2d 819 (1960). That case held that the exclusive remedy provision of the Workers' Compensation Act barred a hospital employee's malpractice action against his employer. A panel of the District of Columbia Court of Appeals affirmed the dismissal. The panel suggested that plaintiffs seek a rehearing *en banc* so that the court could "address more fully" the contention that *Lindsay* should be re-examined. *Morris v. Providence Hospital,* C.A. 82-182 (D.C. App., Jan. 31, 1983 (Appendix, p. 12a). The D.C. Court of Appeals, sitting *en banc,* denied rehearing on the ground that "the issue presented is one of interpretation of a federal statute precluding a question of local law construction." *Morris v. Providence Hospital,* C.A. 82-182 (D.C. App., March 16, 1983) (Appendix, p. 9a). Petition for certiorari was not filed.

This malpractice complaint against Providence was then filed in the United States District Court for the District of Columbia. The Honorable Louis Oberdorfer granted defendant's motion for summary judgment and dismissed the action based on *Lindsay.* Judge Oberdorfer's memorandum opinion stated first that the reconsideration of *Lindsay* should be by the federal Court of Appeals that decided *Lindsay,* and second that the case did involve a federal question. *Morris v. Providence Hospital,* C.A. 83-1314 (D.D.C., June 22, 1983) (Appendix, p. 5a). Appeal was taken to the United States Court of Appeals for the District of Columbia. A panel of the Court of Appeals affirmed the District Court's ruling, stating that reconsidera-

tion of *Lindsay* could be achieved only by the court sitting *en banc*. *Morris, et al. v. Providence Hospital,* C.A. 83-01314 (Cir. D.C., Apr. 13, 1984). Morris' Petition for Rehearing and suggestion for Rehearing *En Banc* were denied. *Morris, et al. v. Providence Hospital* (Cir. D.C., May 9, 1984) (Appendix, pp. 14a, 15a). In essence, petitioner has made every conceivable effort to have the anachronistic *Lindsay* decision reviewed without success, even though it has had and will continue to have a devastating effect on the quality of medical care provided to employees of health care providers.

REASONS FOR GRANTING THE PETITION

Petitioner respectfully submits that the issue passed upon by the courts below presents an important question of federal law which has not been, but should be, settled by this Court. Accordingly, the reasons and arguments for the allowance of the writ are fully set forth below.

I. THE LOWER COURT'S MEMORANDUM OPINION SHARPLY CONFLICTS WITH THE HOLDINGS OF THIS COURT WHICH RECOGNIZE THE DUAL CAPACITY DOCTRINE AS APPLIED TO SECTION 905 OF THE LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT.

The lower court's memorandum opinion relied solely on *Lindsay v. George Washington University,* 108 U.S. App. D.C. 4, 279 F.2d 819 (1960). *Lindsay* held that the exclusive remedy provision of the Workers' Compensation Act (the Act) barred a hospital employee's malpractice action against his employer. The Supreme Court has since overruled the basic premise of the *Lindsay* holding by its application of the dual capacity doctrine in *Reed v. The Yaka,* 373 U.S. 410 (1963).

In *Reed,* this court struck down the lower court's superficial interpretation and application of Section 905(a) to a longshoreman, employed by the bareboat charterer or owner *pro hac vice,* injured while loading a ship. By allowing Reed to bring an action against the owner *pro hac vice*/employer, this Court corrected the unreasonable, unjust and inequitable result which occurs when the exclusive remedy provision is applied in blanket form. This Court further distinguished form from substance by stating that Reed would have been "completely denied the traditional and basic protection of the warranty of seaworthiness" simply because the *effective* owner of the ship was also his employer. 373 U.S. at 413, emphasis ours. The Court concluded:

> . . . [Reed's] . . . need for protection from unseaworthiness was neither more nor less than that of a longshoreman working for a stevedoring company. As we said in a slightly different factual context, 'All were subjected to the same danger. All were entitled to like treatment under the law.' [citations omitted]

373 U.S. at 415.

This Court has reinforced the application of the dual capacity doctrine by relying on *Reed* in more recent decisions. *Jones & Laughlin Steel Corp. v. Pfeifer,* ____ U.S. ____, 103 S.Ct. 2541 (1983); *Jackson v. Lykes Brothers Steamship Co., Inc.,* 386 U.S. 731 (1967). In *Jones,* a plaintiff who had a work-related injury was allowed to bring an action in negligence against the employer/shipowner, notwithstanding the receipt of workers' compensation. ____ U.S. at ____, 103 S.Ct. at 2548.

While this Court did not refer specifically to the dual capacity doctrine, the Court's reasoning as set forth above indicates that the employer can assume two roles; first,

that of employer; and second that of shipowner. In *Reed, Jackson* and *Jones,* the employer could not escape liability in his second, shipowner, capacity despite the Act's exclusivity provision. Since *Reed, Jackson* and *Jones* have overruled *Lindsay,* the lower court erred by relying on *Lindsay* to dismiss petitioner's action.

II. SINCE THE SUPREME COURT HELD THE EMPLOYER-SHIPOWNER IN *REED* LIABLE FOR A SINGLE INJURY THE DUAL CAPACITY DOCTRINE MUST NATURALLY APPLY TO PETITIONER'S DOUBLE INJURY.

The dual capacity doctrine as applied in *Reed, Jackson* and *Jones* is naturally applied to petitioner's *double* injury case. In *Reed, Jackson* and *Jones,* the employee suffered from a single compensable injury. In each case, the employee received workers' compensation and in addition, was allowed to sue in tort for negligence damages. Here, petitioner suffered the first compensable injury while at work. The paralysis, petitioner's second injury, is also compensable under the Act as a consequential aggravation of his original compensable injury. At this point, the employee/employer relationship ended and the patient/hospital relationship began. The second injury occurred when Providence provided negligent medical treatment to Mr. Morris in its capacity as a hospital, not an employer.

Petitioner, like the employee in *Reed, Jackson* and *Jones,* has a separate cause of action against Providence Hospital. Providence, in its capacity as a hospital, was not responsible for the strain, but for the devastating results of treatment rendered to Mr. Morris as a member of the general public.

Since the relationship between Mr. Morris' paralysis and the hospital treatment is clear, the application of *Reed* is only natural. Mr. Morris was an employee, injured while under the employ of Providence. Mr. Morris, the patient,

was permanently paralyzed by Providence, the hospital. This malpractice action was filed against Providence in its second capacity as a hospital, which provides medical treatment to the general public. In this separate and distinct capacity, Providence has a duty to provide the general public medical services free from negligence. A gross parody would exist if Providence were allowed to escape liability, on the mere fortuity that the patient who alleged malpractice was an employee, when the same patient would have a cause of action if treated by a hospital not his employer.

The only Court of Appeals case which has addressed this issue since the holdings of *Reed, Jackson* and *Jones,* has followed the Supreme Court and ruled against the employer/hospital. *Wright v. United States,* 717 F.2d 254 (6th Cir., 1983). The *Wright* court held that an employee of a hospital could have sued her employer under the "dual capacity doctrine" as a provider of medical treatment. 717 F.2d at 259.

The court espoused the following test for application of the dual capacity doctrine:

> An employer may become a third person, vulnerable to tort suit by an employee, if – and only if – he possesses a second persona so completely independent from and unrelated to his status as employer that by established standards the law recognizes it as a separate legal person.

Wright, at 259, citing with approval 2A Larson, Workmen's Compensation Law 14-229, Section 72.81 (1982).

Simply stated, the dual capacity doctrine is the progeny of this Court's rationale in deciding *Reed, Jackson* and *Jones.* In these cases, this Court drew a practical line be-

tween the longshoreman/employer, longshoreman/shipowner relationship. The result of the line was one predicated on common sense, "that is the employer in his second capacity was charged with the traditional, absolute and non-delegable obligation of seaworthiness which it should not be permited to avoid." *Reed* at 415. A similar line should be drawn between the employee/employer, patient/hospital relationship, a result which is in total harmony with the holdings of *Reed, Jackson* and Jones.

III. THE LOWER COURT'S MEMORANDUM OPINION DIRECTLY CONFLICTS WITH THE CLEAR MAJORITY OF STATES DECIDING THIS ISSUE WHICH HAVE FOLLOWED THE SUPREME COURT'S HOLDING IN *REED* ALLOWING THE EMPLOYER, IN ITS SECOND CAPACITY, TO BE SUED IN TORT.

An opinion on this issue by the Supreme Court will have nationwide impact on the interpretation of the exclusivity clause in each state's workers' compensation laws. The modern trend is exemplified by the majority of states which have adopted *Reed* and the dual capacity doctrine as applied to an employer who possesses a second persona. Seven states, including California, New York, Pennsylvania and Ohio, have held the employer/hospital liable to an employee for malpractice or negligence. *See, e.g., Tatrai v. Presbyterian University Hospital,* 497 Pa. 247, 439 A.2d 1162 (1982); *D'Angona v. County of Los Angeles,* 166 Cal. Rptr. 177, 613 P.2d 238 (1980); *Guy v. Arthur H. Thomas Co., et al.,* 55 Ohio St.2d 183, 370 N.E.2d 488 (1978); *Milashouskas, et al. v. Mercy Hospital, et al.,* 64 A.D.2d 866, 408 NYS.2d 808 (1978); *Panagos v. North Detroit Central Hospital,* 35 Mich. App. 554, 192 N.W.2d 542 (1971); *Pyles v. Bridges, et al.,* 259 So.2d 724 (Fla. Dist. Ct. App. 1972); *see German v. Chemray, Inc., et al.,* 564 P.2d 636 (Okla. 1977) (Court held em-

ployer who selected hospital was responsible with hospital for malpractice), *but see McAlister v. Methodist Hospital of Memphis,* 550 S.W.2d 240 (Tenn. 1977).

The clear weight of authority supports the application of the dual capacity doctrine, as espoused by this Court, when an employer possesses a second persona as a health care provider which is so completely independent from and unrelated to his status as an employer. The holdings of *Lindsay* and *McAlister* were based on a superficial interpretation of the Act's exclusivity provision without consideration of the practical effect of that interpretation. Both cases ignore common sense and legal sense. Aside from the fact that *Lindsay* and *McAlister* are contrary to the great weight of authority, there are multiple sound policy arguments for application of the dual capacity doctrine.

First, the dual capacity doctrine does not destroy the theoretical superstructure of workers' compensation. Instead, the symmetry it imposes merely strengthens it. Workers' compensation is premised on the idea of status.*Cudahy Packing Co. v. Paramone,* 263 U.S. 418 (1923). Workmen are entitled to compensation for injuries sustained in the performance of their duties. Compensation is based not upon any act or omission of the employer, but upon the existence of the employee/employer relationship. 263 U.S. at 423. The dual capacity doctrine merely allows the employee to sue his employer where the employee/employer relationship no longer exists because the employer has a second persona unrelated to his status as an employer. The employer, as a hospital, does not participate in the mutual compromise of rights that is the essence of the workers' compensation scheme and should not be permitted to rely on the compromise to escape liability for their non-employer activities.

Second, the workers' compensation scheme is based on the fact that most workplace accidents occur without fault or in a manner making assignment of fault nearly impossible. This assumption is not relevant to injuries resulting from medical malpractice, which occurs away from the work area, is easier to identify, and can be judged in light of ascertainable medical standards. Medical malpractice, unlike the occupational accidents that are an inevitable consequence of working, is neither inevitable nor a risk that is inherent in the work process.

Third, workers' compensation law is supposed to provide employers with an economic incentive to deter future accidents. If the employer/hospital is allowed immunity based on the Act, hospitals would be invulnerable to malpractice action by those victims who by coincidence are employees. If the employer/hospital knows that damages will be limited by the Act, all deterrence to negligence would be removed. There is simply no reason to allow a hospital to escape liability for the negligent rendering of medical treatment to any member of society. The Supreme Court of California holding for the employee/patient stated:

> . . . it may be said that in treating plaintiff's injuries the hospital did not act in its capacity as employer but as a hospital, and since it assumed the obligations of a hospital to a patient it should be liable in that capacity rather than as an employer for an aggravation of plaintiff's injury.

D'Angona, supra at 242.

Finally, the lower court's decision holds a health care provider to a lesser standard of care if its patient happens to be an employee. A health care provider can discriminate against its own employees with impunity since traditional

tort remedies and their deterrent effect would not apply to the care given to the employee. The Supreme Court of Pennsylvania, recognizing this glaring inconsistency, concluded:

> . . . that Workmen's Compensation is not her [appellant's] exclusive remedy. There is no reason to distinguish appellant [employee] from any other member of the public injured during the course of treatment. The risk of injury which appellant suffered was a risk to which any member of the general public receiving like treatment would have been subjected.

Tatrai, supra at 439 A.2d 1166.

In light of the overwhelming authority in favor of applying the dual capacity doctrine to employers who possess a second persona and the aforementioned public policy considerations, the lower court's decision, if upheld, would adversely affect substantial rights and liabilities of many employees who share petitioner's predicament. To allow *Lindsay* or any of its followings to stand would be derelict to common sense and cause serious consequences now and in the future. To avoid further growth of the lower court's rationale, immediate resolution of this matter is required at this time.

CONCLUSION

Wherefore, Charles P. Morris and Henrietta Morris pray that this Court grant their Petition for a Writ of Certiorari or any other relief that this Court deems appropriate.

Respectfully submitted,

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August 7, 1984

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 83-1779 — September Term, 1983
Civil Action No. 83-01314

Charles P. Morris,

Appellant

Henrietta Morris
Wife of Charles P. Morris

v.

Providence Hospital

No. 83-1786 — Civil Action No. 83-01314

Charles P. Morris, et al.

v.

Providence Hospital,

Appellant

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA.

Before: EDWARDS and SCALIA, Circuit Judges, and FRIEDMAN, *Circuit Judge, United States Court of Appeals for the Federal Circuit.

JUDGMENT

These causes came on to be heard on the record on appeal from the United States District Court for the District of Columbia. Upon consideration of the foregoing, it is

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*Sitting by designation pursuant to 28 U.S.C. §291(a) (1976).

ORDERED and ADJUDGED, by this Court, that the decision of the District Court is affirmed, for the reasons set forth in the accompanying Memorandum.

It is ORDERED, *sua sponte,* that the Clerk shall withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing. See Local Rule 14, as amended on November 30, 1981 and June 15, 1982. This instruction to the Clerk is without prejudice to the right of any party at any time to move for expedited issuance of the mandate for good cause shown.

Bills of cost must be filed within 14 days after entry of judgment. The Court looks with disfavor upon motions to file bills of costs out of time.

Per Curiam
For The Court

/s/ George A. Fisher
Clerk

MEMORANDUM

Although the D.C. Court of Appeals sitting *en banc* has suggested that it is bound by our prior decision in *Lindsay v. George Washington University,* 279 F.2d 819 (D.C. Cir. 1960), it is not at all clear that they were so bound in this case, or that they should consider themselves so bound in the future. *See M.A.P. v. Ryan,* 285 A.2d 310, 312 (D.C. 1971). It is clear, however, that our prior decision in *Lindsay* is squarely on point, and, absent a reconsideration of *Lindsay* by this court sitting *en banc,* we will not overrule a prior decision by a panel in this Circuit. *See United States v. Caldwell,* 543 F.2d 1333, 1369 n.19 (D.C. Cir. 1974) (as amended 1975) (Supplemental Opinion), *cert. denied,* 423 U.S. 1087 (1976); *United States v. Lewis,* 475 F.2d 571, 574 (5th Cir. 1972). Accordingly, the District Court properly granted summary judgment for the appellee and dismissed the complaint.

FILED APR 13 1984

GEORGE A. FISHER
Clerk

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CHARLES P. MORRIS, *et al.*,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Civil Action
	)	No. 83-1314
PROVIDENCE HOSPITAL,	)	
	)	
Defendant.	)	
	)	

MEMORANDUM

Charles Morris was employed as a chauffeur by defendant hospital. The hospital's Employee Health Care Center treated him for acute back pain suffered while on the job. Later the hospital staff performed surgery which was unsuccessful. The complaint here alleges that as a result of the defendant hospital's negligent performance of the medical services it rendered to Mr. Morris, he has suffered loss of bladder and bowel control, paralysis of both feet, significant loss of leg functioning, severe shock to his nervous system and permanent disability. Mrs. Morris sues for loss of her husband's consortium.

The hospital moves to dismiss the complaint or for summary judgment. Its theory is twofold: first, that the District of Columbia workmen's compensation statute, D.C. Code § 36-501 (1973), provides the exclusive remedy for plaintiffs and, as a local statute, does not provide this Court with the federal question jurisdiction that plaintiffs allege; and second, that plaintiffs have already litigated and lost this case in the Superior Court for the District of

Columbia and are therefore barred from relitigating it here on *res judicata* grounds.

The first argument speaks for itself; the second requires explication. Defendant's exhibits show and (plaintiffs concede) that this same medical malpractice suit was earlier filed in the Superior Court of the District of Columbia. *Morris v. Providence Hospital,* C.A. 9449-81 (June 25, 1981). That court dismissed the complaint on the authority of *Lindsay v. George Washington University,* 279 F.2d 819 (D.C. Cir. 1960).*

On appeal from the dismissal of the Morris case, a panel of the District of Columbia Court of Appeals considered itself bound by *Lindsay* and therefore affirmed, suggesting that plaintiffs seek a rehearing *en banc* so that the court could "address more fully" the contention that *Lindsay* should be reexamined. *Morris v. Providence Hospital,* No. 82-182 (D.C. Ct. App. Jan. 31, 1983). The D.C. Court of Appeals sitting *en banc* denied rehearing, however, on the ground that "the issue presented is one of interpretation of a federal statute thus precluding a question of local law construction." *Morris v. Providence Hospital,* No. 82-182 (D.C. Ct. App. March 16, 1983). No petition for certiorari from this *en banc* decision was filed.

Plaintiffs oppose defendant's motion on both grounds. They contend that the *merits* of this litigation have never

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*In *Lindsay,* an employee of defendant hospital was injured while on the job and was treated for his injury by the hospital. His injuries were much less serious than plaintiffs' here, but he also sued the hospital for malpractice. In affirming a grant of summary judgment for the hospital, the Court of Appeals stated that the exclusivity clause of the workmen's compensation statute was not avoided by "the fortuity that the employer . . . also operated the hospital where the professional services complained of were rendered." *Id.* at 821.

been heard or decided by any court, so that *res judicata* doctrines are inapplicable. This response is accurate.

As to federal question jurisdiction, plaintiffs point out that the D.C. Workmen's Compensation Act of 1928 adopted the identical language of the federal Longshoreman and Harbor Workers' Compensation Act, 33 U.S.C. § 905(a). They cite *Del Vecchio v. Bowens,* 296 U.S. 280, 281-282 (1935), for the proposition that issues involving the District of Columbia Workmen's Compensation Act are federal questions because their resolution sets nationwide precedent for the identical federal Act. Plaintiffs further point to the order of the D.C. Court of Appeals denying them rehearing, essentially because the case raised a federal question. Thus plaintiffs argue that federal jurisdiction in this case is proper and in fact required.

In the present posture of this case, it may be assumed that there is a federal question and that, in declining to address it, the local Appeals Court preserved the underlying merits for consideration when and if the precedential question is settled. *Res judicata* is therefore no bar. But *Lindsay* is. At oral argument the parties conceded, and the Court has determined, that plaintiffs' case cannot be distinguished from *Lindsay* and that *Lindsay* is dispositive of their claim. The original D.C. Court of Appeals panel hinted that *Lindsay* might merit reconsideration; *see also Tatrai v. Presbyterian University Hospital,* 439 A.2d 1162 (Pa. 1982) (concurring majority opinion) (adopting "dual capacity" theory to permit recovery by employees against employers not acting as employers at the time of injury); *D'Angona v. County of Los Angeles,* 27 Cal. 3d 661, 613 P.2d 238 (1980) (same); *Guy v. Arthur H. Thomas Co.,*378 N.E.2d 488 (Ohio 1978) (same). The *en banc* court's reaction indicates an expectation that such requests for reconsideration should be addressed to the federal

Court of Appeals that decided *Lindsay*. In any case, *Lindsay* is binding on this Court. On its authority, the accompanying Order will grant defendant's motion for summary judgment and dismiss the complaint.

Date: June 22, 1983

/s/ Louis F. Obendorfer
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CHARLES P. MORRIS, *et al.*,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Civil Action
	)	No. 83-1314
PROVIDENCE HOSPITAL,	)	
	)	
Defendant.	)	
	)	

ORDER

For reasons stated in the accompanying Memorandum, it is this 22d day of June, 1983, hereby

ORDERED: that defendant's motion for summary judgment is GRANTED: and it is further

ORDERED: that the complaint should be and is hereby DISMISSED.

/s/ Louis F. Obendorfer
UNITED STATES DISTRICT JUDGE

FILED
JUNE 22, 1983
CLERK, U.S. DISTRICT COURT
DISTRICT OF COLUMBIA

APPENDIX C

DISTRICT OF COLUMBIA COURT OF APPEALS
500 Indiana Avenue, N.W.
Washington, D.C. 20001
(202) 638-7113

No. 82-182
CHARLES P. MORRIS, ET AL., Appellants,

v. CA 9449-81

PROVIDENCE HOSPITAL, Appellee.

BEFORE: Newman, Chief Judge; Kern, Nebeker, Mack, Ferren, Pryor, Belson, and Terry, Associate Judges.

ORDER

On consideration of appellants' motion for reconsideration in support of petition for rehearing en banc, it is

ORDERED that appellants' motion for reconsideration is denied.

PER CURIAM

Copies to:

Honorable Sylvia Bacon

Clerk, Superior Court

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DISTRICT OF COLUMBIA
COURT OF APPEALS
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Clerk

DISTRICT OF COLUMBIA
COURT OF APPEALS

No. 82-182
CHARLES P. MORRIS,
AND HENRIETTA MORRIS, Appellants,

v. CA 9449-81

PROVIDENCE HOSPITAL, Appellee.

BEFORE: Newman, Chief Judge; Kern, Nebeker, Mack, Ferren, Pryor, Belson, and Terry, Associate Judges.

ORDER

On consideration of the petition for rehearing en banc and the ensuing pleadings relating thereto, and it appearing to the court that the issue presented is one of interpretation of a federal statute thus precluding a question of local law construction, it is

ORDERED that the aforesaid petition is denied.

PER CURIAM

Copies to:

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DISTRICT OF COLUMBIA
COURT OF APPEALS
FILED
MAR 16 1983
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Clerk

APPENDIX D

DISTRICT OF COLUMBIA COURT OF APPEALS

No. 82-182

CHARLES P. MORRIS, et al.,
Appellants,

v. CA 9449-81

PROVIDENCE HOSPITAL,
Appellee.

Appeal from the Superior Court of the
District of Columbia
Civil Division
(Hon. Sylvia Bacon, Trial Judge)

(Argued January 20, 1983 Decided January 31, 1983)

Before KERN, NEBEKER and FERREN, *Associate Judges.*

MEMORANDUM OPINION AND JUDGMENT

Appellant injured his back in April 1980, in the course of his employment as a chauffeur for Providence Hospital. Immediately following the injury, and for several weeks thereafter, appellant received treatment at the Employees Health Dispensary of Providence Hospital. During the course of appellant's treatment, his condition worsened, surgery was required (but was unsuccessful), and appellant is now partially paralyzed.

Appellant and his wife brought suit against Providence Hospital in June 1981, alleging malpractice in the treatment of his back injury, and claiming, *inter alia,* loss of consortium for his wife. Their suit was dismissed by the

trial court on the authority of *Lindsay v. George Washington University,* 2798 F.2d 819 (D.C. Cir. 1960), which held on similar facts that a suit against the employer for damages, in addition to workmen's compensation, is barred by the exclusive liability provisions of the D.C. Workmen's Compensation Act.[1]

The parties are agreed that this case is not significantly distinguishable from the *Lindsay* case and therefore that *Lindsay* is controlling precedent. However, appellant argues that the *Lindsay* decision is unjust to an employee in circumstances where the injury results from acts of the employer which are independent from and unrelated to the employer-employee relationship. Appellant urges that court to adopt the "dual capacity" doctrine applied in other jurisdictions to permit recovery against an employer for injuries incurred in transactions where the employer was acting, not as employer, but as a separate "third" person.[2] *E.g., Duprey v. Shane,* 39 Cal.2d 781, 249 P.2d 8 (1952); *D'Angona v. County of Los Angeles,* 27 Cal.2d 661, 613 P.2d 238 (1980); *Guy v. Arthur H. Thomas Co.,* 55 Ohio St.2d 183, 378 N.E.2d 488 (1978); *Tatria v. Presbyterian University Hospital,* 439 A.2d 1162 (Pa. 1982); *see* 2A A. Larson, Larson's Workmen's Compensation Law, §§ 72.61(c), 72.81 (1982).

However, under *M.A.P. v. Ryan,* 285 A.2d 310 (D.C. 1971), we may not refuse to follow such a controlling prior

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[1]Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 901, *et. seq.*, as made applicable to the District of Columbia by D.C. Code § 36-501 (1973 ed.). 33 U.S.C. § 905 provides that the liability of an employer as prescribed by the Act "shall be exclusive and in place of all other liability of such employer to the employee. . . ."

[2]33 U.S.C. § 933 describes a third party as "some person other than the employer or a person or persons in his employ."

opinion of the United States Court of Appeals for the District of Columbia Circuit except by decision of the full court sitting en banc. Thus, we are constrained to affirm the trial court's dismissal of appellant's suit. Of course, appellant may wish to use his petition for hearing en banc as a petition for rehearing en banc; and appellee may then file a response thereto. The full court may then consider the need to address more fully the contentions in light of the division's holding that *Lindsay* is controlling.

Accordingly, it is ORDERED and ADJUDGED that the judgment on appeal herein is affirmed.

FOR THE COURT:

/s/ Alan I. Herman
Alan I. Herman, Clerk.

Copies to:

Honorable Sylvia Bacon

Clerk, Superior Court

Mark J. Brice, Esq.
2020 K Street NW, #840
Washington, DC 20006

Walter J. Murphy, Jr., Esq.
Wheaton Plaza North Building, #703
Wheaton, MD 20902

DISTRICT OF COLUMBIA
COURT OF APPEALS
FILED
JAN 31 1983
/s/ Alan I. Herman
Clerk

APPENDIX E

DISTRICT OF COLUMBIA COURT OF APPEALS
500 Indiana Avenue, N.W.
Washington, D.C. 20001
(202) 638-7113

No. 82-182
CHARLES P. MORRIS, ET AL., Appellants,

v. CA 9449-81

PROVIDENCE HOSPITAL, Appellee.

BEFORE: Newman, Chief Judge; Kelly, Kern, Nebeker, Mack, Ferren, Pryor, Belson, and Terry, Associate Judges.

ORDER

On consideration of appellants' petition for hearing en banc and it appearing that the majority of the judges of this court has voted to deny the petition, it is

ORDERED that appellants' petition for hearing en banc is denied.

PER CURIAM

Copies to:

Mark J. Brice, Esq.
2020 K Street NW, #840, 20006

Walter J. Murphy, Jr., Esq.
Wheaton Plaza North Building, #703
Wheaton, MD 20902

DISTRICT OF COLUMBIA
COURT OF APPEALS
FILED
NOV 10 1982
/s/ Alan I. Herman
Clerk

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 83-1779 September Term, 1983

CHARLES P. MORRIS, et al., Appellants
Civil Action No. 83-01314

v.

Providence Hospital

And Consolidated Case No. 83-1786

BEFORE Robinson, Chief Judge; Wright, Tamm, Wilkey, Wald Mikva, Edwards, Ginsburg, Bork, Scalia and Starr, Circuit Judges and Friedman,* Circuit Judge, United States Court of Appeals for the Federal Circuit

ORDER

The Suggestion for Rehearing *en banc* of Appellants Morris, et al., has been circulated to the full Court and no member has requested the taking of a vote thereon. On consideration of the foregoing, it is

ORDERED by the Court *en banc* that the aforesaid Suggestion is denied.

Per Curiam

For the Court:

GEORGE A. FISHER, Clerk

BY: /s/ Robert A. Bonner
Robert A. Bonner
Chief Deputy Clerk

United States Court of Appeals
for the District of Columbia
FILED
MAY 9 1984
GEORGE A. FISHER
Clerk

*Sitting by designation pursuant to Title 28 U.S.C. § 291(a).

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 83-1779 September Term, 1983

CHARLES P. MORRIS, et al., Appellants
Civil Action No. 83-01314

v.

Providence Hospital

And Consolidated Case No. 83-1786

BEFORE Edwards and Scalia, Circuit Judges, and Friedman, Circuit Judge, United States Court of Appeals for the Federal Circuit

ORDER

On consideration of the Petition for Rehearing of Appellants Morris, et al., filed April 26, 1984, it is

ORDERED that the aforesaid Petition for Rehearing is denied.

Per Curiam

For the Court:

GEORGE A. FISHER, Clerk

BY: /s/ Robert A. Bonner
Robert A. Bonner
Chief Deputy Clerk

*Sitting by designation pursuant to Title 28 U.S.C. § 291(a).

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 83-1779 September Term, 1983

CHARLES P. MORRIS,

Appellants

Henrietta Morris
Wife of Charles P. Morris

v.

Providence Hospital

AND CONSOLIDATED CASE No. 83-1786

BEFORE Robinson, Chief Judge; Wright, Tamm, Wilkey, Wald Mikva, Edwards, Ginsburg, Bork, Scalia and Starr, Circuit Judges

ORDER

The Suggestion for Initial Hearing *En Banc*, filed September 27, 1983, has been circulated to the full Court and no member has requested the taking of a vote thereon. On consideration of the foregoing, it is

ORDERED by the Court *en banc* that the aforesaid Suggestion for Hearing *En Banc* is denied.

Per Curiam

For the Court:
GEORGE A. FISHER, CLERK

BY: /s/ Daniel M. Cathey
First Deputy Clerk

No. 84-219

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

CHARLES P. MORRIS, *et al.*,
Petitioners,

v.

PROVIDENCE HOSPITAL,
Respondent.

OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

James A. Welch
(Counsel of Record)
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Attorney for Respondent

September, 1984

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33 pp

QUESTION PRESENTED

Whether a tort action brought by an employee against his employer, on the basis of improper medical treatment administered by the employer to the employee for work-related injuries, is barred by the exclusive remedy provision of the Workmen's Compensation Law for the District of Columbia.

PARTIES TO THE PROCEEDINGS

The parties to the proceedings below in the United States Court of Appeals for the District of Columbia Circuit were petitioners, Charles P. Morris and Henrietta Morris, and the respondent Providence Hospital, a corporation owned by the Daughters of Charity.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-219

CHARLES P. MORRIS, *et al.*,
Petitioners,

v.

PROVIDENCE HOSPITAL,
Respondent.

OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

Respondent, Providence Hospital, respectfully prays that the Petition for Writ of Certiorari to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit be denied.

OPINIONS BELOW

The memorandum opinion of the District of Columbia Court of Appeals dated January 31, 1983 is an unreported opinion.

The memorandum opinion of the Honorable Louis Oberdorfer, Judge of the United States District Court for

the District of Columbia, dated June 22, 1983 is an unreported opinion.

The memorandum opinion of the United States Court of Appeals for the District of Columbia Circuit dated April 13, 1984 is an unreported opinion.

STATEMENT OF THE CASE

The petitioner, Charles Morris, was injured during the course of his employment for the Appellee and received medical care for that injury from the respondent, his employer.

The petitioners filed suit in the Superior Court for the District of Columbia seeking damages for personal injury and loss of consortium for alleged negligence in rendering the medical care. Judge Sylvia Bacon granted a Motion to Dismiss on the authority of *Lindsay v. George Washington University,* 108 U.S. App. D.C. 44, 279 F.2d. 819 (1960) because the exclusive remedy provided by the law of the District of Columbia against the employer is limited to those payments required of the employer for work-related injuries, including any complication thereof, caused by medical treatment. The decision was appealed, and it was conceded at argument that *Lindsay,* supra was controlling. The panel of the District of Columbia Court of Appeals was constrained by the Court's rules from overturning a controlling precedent, and suggested that the only avenue for the Appellants (Petitioners here) to pursue would be a request for a hearing *en banc,* which Petitioners did. The District of Columbia Court of Appeals, sitting *en banc,* denied the request and noted that it did not consider it a matter of controlling local law but of interpretation of a federal statute. The Petitioners filed a request for reconsideration contending it was a local statute

and of sufficient importance to warrant an *en banc* hearing and this was denied. No petition for Writ of Certiorari, to the District of Columbia Court of Appeals was filed with this Court.

The Petitioners then filed a suit in the United States District Court alleging the same matters as in the Superior Court case. This Respondent moved to dismiss or for summary judgment on the basis that there was no federal jurisdiction, that the Petitioners having chosen to bring the action in the District of Columbia Courts could not refile in the federal court, even if there had been a federal question, and on the basis that *Lindsay, supra* controlled. The District Court agreed with Petitioner that the merits of the litigation had never been heard or decided by any court, so that res judicata doctrines are inapplicable. The District Court assumed without deciding that there was a federal question presented by the case but that *Lindsay, supra* is dispositive of Petitioners' claim and granted the Motion for Summary Judgment and dismissed the Complaint.

Petitioner filed a Notice of Appeal to this dismissal and Respondent crossappealed the trial court's rulings on jurisdiction. A panel of the United States Court of Appeals for the District of Columbia affirmed the District Court's ruling, stating that the District of Columbia Court of Appeals was not clearly bound to follow *Lindsay, supra* citing *M.A.P. v. Ryan,* 285 A.2d 310 (D.C. 1971) for this proposition, but that it would not consider overturning *Lindsay, supra* unless sitting *en banc.* Petitioner's Petition for Rehearing and Suggestion for Rehearing En Banc were denied.

REASON FOR DENYING THE PETITION

Respondent respectfully submits that the legal issue presented below involves application of local law and not a federal question that should concern this Court in review. In support of its position Respondent states as follows:

I. THE LEGAL ISSUE RAISED IN THE CASE BELOW INVOLVES THE APPLICATION OF LOCAL LAW OF THE DISTRICT OF COLUMBIA REGARDING TORT ACTIONS AS AFFECTED BY THE EXCLUSIVE REMEDY PROVISION OF THE DISTRICT OF COLUMBIA WORKMEN'S COMPENSATION STATUTE, D.C. CODE §36-501 (1973).

The underlying suit upon which the petition is based is a tort action. More specifically it is a suit in which the Petitioners allege injury and damages as a result of lack of proper medical care by the Respondent. It is what is commonly called a medical malpractice case. Such a cause of action does not arise from a federal law, but finds its origin in the common law of the District of Columbia. As a defense to this cause of action, Respondent has successfully relied on the exclusive remedy provision of the District of Columbia's Worker's Compensation Act. D.C. Code §36-501 (1973). Petitioners have argued for federal jurisdiction below by recognizing that in 1928 the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §901 *et seq.* (1973), was adopted as the workmen's compensation law for the District of Columbia and that in 1935 this Court granted writ of certiorari involving a decision of the United States Court of Appeals for the District of Columbia construing the Longshoremen's and Harbor Workers' Compensation Act. *Del Vecchio v. Bowers,* 56 S. Ct. 190, 296 U.S. 280, (1935). However, a review of *Del Vecchio* clearly indicates that it is a decision dealing only

with the interpretation of what was compensable under the Act. *Del Vecchio* can easily be distinguished from the local nature of this action which involves more than just the application of a federal statute itself, but has effect on a common law tort in the District of Columbia.

Further, both the United States Court of Appeals for the District of Columbia and the District of Columbia Court of Appeals have stated that the District of Columbia Workmen's Compensation Act was a congressional enactment of a local District of Columbia statute dealing exclusively with local matters. *Gudmundson v. Cardillo,* 75 U.S. App. D.C. 230, 126 F.2d 521 (1942); *Director of Office of Whrs' Comp. v. National Van Lines, Inc.,* 198 U.S. App. D.C. 239, 613 F.2d 972 (1979). *District of Columbia v. Greater Washington,* D.C. App. 442 A.2d 110 (1981), hearing *en banc* denied 445 A.2d 960 (1982). It seems obvious that in this case, the U.S. Court of Appeals for the District of Columbia agreed that the issue was local in nature rather than federal when it said in its Memorandum Opinion that the D.C. Court of Appeals was not clearly prevented from considering overruling its prior decision in *Lindsay v. George Washington University,* 108 U.S. App. D.C. 44, 279 F.2d 819 (1960).

On several occasions this Court has recognized its policy not to interfere with local rules of law fashioned by the Courts of the District of Columbia. *Miller v. U.S.,* 78 S. Ct. 1190, 357 U.S. 301, 2 L.Ed. 2d 1332, (1958). *Pernell v. Southall Realty,* 94 S. Ct. 1723, 416 U.S. 363, 40 L.Ed. 198 (1974). *Fisher v. United States,* 66 S. Ct. 1318, 328 U.S. 463 (1946). Respondent urges this Court to apply this policy regarding this case.

II. PETITIONERS ARE ATTEMPTING TO PERSUADE THIS COURT TO FOLLOW THE DOCTRINE OF DUAL CAPACITY THAT THIS COURT HAS NEVER ADOPTED AND WHICH HAS BEEN FOLLOWED ONLY BY A SMALL MINORITY OF STATE COURTS.

Petitioners argue that this Court has recognized the Dual Capacity Doctrine and cite for this proposition the case of *Reed v. The YAKA*, 373 U.S. 410 (1963). Nowhere in the opinion of this decision can be found the language "dual capacity doctrine." In 1972 Congress amended the Longshoremen's Act, Section 5(b) providing:

> The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the same time the injury occurred. The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this Act.

Longshoremen's and Harbor Workers' Compensation Act, Sec. 5(b), as amended by P.L. 92-576, effective November 26, 1972.

This amendment in effect eliminated the liability exposure created by *Reed, supra.* This Court has concededly also held an employer that is both shipowner and stevedore liable to an injured employee under the Longshoremen's Act and for negligence in *Jones & Laughlin Steel Corp. v. Pfeifer,* 103 S. Ct. 2541, ____ U.S. ____ (1983). However, again there is no dual capacity analysis underlying the Court's rationale of the decision. The reason for the decision is rather based on the intent of Congress as implied from the 1972 language of the amendment of Section 5(b) and from a passage from the House Committee report. See 2A Larson, Workmen's Compensation Law §72.84 at 14-248 (1982).

Petitioner argues that this concept of dual capacity is such a compelling concept that the majority of states are following it. This is not so. The concept of dual capacity first appeared in the State of California, *Duprey v. Shane,* 39 Cal. 2d 781, 249 P.2d 8 (1952). However, the Supreme Court of California refused to apply this doctrine to a factory worker who allegedly died from improper medical treatment given by his employer for a work-related injury. *Dixon v. Ford Motor Company,* 53 Cal. App. 3d 499, 125 Cal. Rptr. 872 (1975). The dual-capacity doctrine has been legislatively abolished in California in August, 1982. Assembly Bill No. 684, Sec. 6, amending §3602 of the Labor Code.

The concept of dual capacity for allowing an employee to recover against his employer for alleged medical malpractice has been soundly criticized in a learned treatise by Arthur Larson.

Larson, supra, and has been followed by the Supreme Court of Illinois. *McCormick v. Caterpillar Tractor Co.,* 85 Ill. 2d 352, 423 N.E. 2d 876 (1981). In that opinion the Court held that an employer who allegedly caused an aggravation of an employee's work-related injury could not be held responsible for paying for this aggravation under the Worker's Compensation Statute and also liable under a tort theory.

III. PETITION FOR WRIT OF CERTIORARI SHOULD HAVE BEEN SOUGHT FROM THE JUDGMENT OF THE DISTRICT OF COLUMBIA COURT OF APPEALS BUT THAT TIME FOR FILING SUCH A PETITION HAS EXPIRED.

The District of Columbia Court of Appeals affirmed the decision of the Superior Court of the District of Columbia on January 31, 1983 and denied *en banc* hearing on No-

vember 10, 1982. Petitioner had 90 days from the denial of rehearing by the District of Columbia Court of Appeals to file a Petition for Writ of Certiorari. 28 U.S.C. §2101(c). Instead, the Petitioners attempted to attack the decision of the D.C. Court of Appeals collaterally which is not permitted. *Hardison v. Alexander,* 211 U.S. App. D.C. 51, 655 F.2d 1281 (1981). This is true even when dealing with state court decisions involving claimed or claimable federal questions. *Reich v. City of Freeport,* (CCA 7 1975) 527 F.2d 666; *Roy v. Jones,* (CCA 3 1973) 484 F.2d 96; *Paul v. Dade County, Florida* (CCA 5 1969) 419 F.2d 10. It is well recognized that since the District of Columbia Court Reform and Criminal Procedure Act of 1970. Pub. L. No. 91-358. The District of Columbia Court of Appeals was made the highest court of the District similar to a State Supreme Court. *Pernell, supra,* at page 367. *M.A.P. v. Ryan* (D.C. App.) 285 A.2d 310 (1971). As such, decisions that were to be challenged further would be either by appeal or petition for writ of certiorari to this Court and not by filing suit in the U.S. District Court or by appeal to the United States Courts of Appeals for the District of Columbia.

CONCLUSION

Wherefore, the Respondent, Providence Hospital prays that this Court deny the Petition for a Writ of Certiorari.

Respectfully submitted,

WELCH, MURPHY & WELCH

James A. Welch, Esquire
(Counsel of Record)
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Wheaton, Maryland 20902
(301) 946-4940
Attorney for Respondent

September, 1984

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 83-1779 — September Term, 1983
Civil Action No. 83-01314

Charles P. Morris,

Appellant

Henrietta Morris
Wife of Charles P. Morris

v.

Providence Hospital

No. 83-1786 — Civil Action No. 83-01314

Charles P. Morris, et al.

v.

Providence Hospital,

Appellant

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA.

Before: EDWARDS and SCALIA, Circuit Judges, and FRIEDMAN, *Circuit Judge, United States Court of Appeals for the Federal Circuit.

JUDGMENT

These causes came on to be heard on the record on appeal from the United States District Court for the District of Columbia. Upon consideration of the foregoing, it is

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*Sitting by designation pursuant to 28 U.S.C. §291(a) (1976).

ORDERED and ADJUDGED, by this Court, that the decision of the District Court is affirmed, for the reasons set forth in the accompanying Memorandum.

It is ORDERED, *sua sponte,* that the Clerk shall withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing. See Local Rule 14, as amended on November 30, 1981 and June 15, 1982. This instruction to the Clerk is without prejudice to the right of any party at any time to move for expedited issuance of the mandate for good cause shown.

Bills of cost must be filed within 14 days after entry of judgment. The Court looks with disfavor upon motions to file bills of costs out of time.

Per Curiam
For The Court

/s/ George A. Fisher
Clerk

MEMORANDUM

Although the D.C. Court of Appeals sitting *en banc* has suggested that it is bound by our prior decision in *Lindsay v. George Washington University,* 279 F.2d 819 (D.C. Cir. 1960), it is not at all clear that they were so bound in this case, or that they should consider themselves so bound in the future. *See M.A.P. v. Ryan,* 285 A.2d 310, 312 (D.C. 1971). It is clear, however, that our prior decision in *Lindsay* is squarely on point, and, absent a reconsideration of *Lindsay* by this court sitting *en banc,* we will not overrule a prior decision by a panel in this Circuit. *See United States v. Caldwell,* 543 F.2d 1333, 1369 n.19 (D.C. Cir. 1974) (as amended 1975) (Supplemental Opinion), *cert. denied,* 423 U.S. 1087 (1976); *United States v. Lewis,* 475 F.2d 571, 574 (5th Cir. 1972). Accordingly, the District Court properly granted summary judgment for the appellee and dismissed the complaint.

FILED APR 13 1984

GEORGE A. FISHER
Clerk

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CHARLES P. MORRIS, *et al.*,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Civil Action
	)	No. 83-1314
PROVIDENCE HOSPITAL,	)	
	)	
Defendant.	)	
	)	

MEMORANDUM

Charles Morris was employed as a chauffeur by defendant hospital. The hospital's Employee Health Care Center treated him for acute back pain suffered while on the job. Later the hospital staff performed surgery which was unsuccessful. The complaint here alleges that as a result of the defendant hospital's negligent performance of the medical services it rendered to Mr. Morris, he has suffered loss of bladder and bowel control, paralysis of both feet, significant loss of leg functioning, severe shock to his nervous system and permanent disability. Mrs. Morris sues for loss of her husband's consortium.

The hospital moves to dismiss the complaint or for summary judgment. Its theory is twofold: first, that the District of Columbia workmen's compensation statute. D.C. Code § 36-501 (1973), provides the exclusive remedy for plaintiffs and, as a local statute, does not provide this Court with the federal question jurisdiction that plaintiffs allege; and second, that plaintiffs have already litigated and lost this case in the Superior Court for the District of

Columbia and are therefore barred from relitigating it here on *res judicata* grounds.

The first argument speaks for itself; the second requires explication. Defendant's exhibits show and (plaintiffs concede) that this same medical malpractice suit was earlier filed in the Superior Court of the District of Columbia. *Morris v. Providence Hospital,* C.A. 9449-81 (June 25, 1981). That court dismissed the complaint on the authority of *Lindsay v. George Washington University,* 279 F.2d 819 (D.C. Cir. 1960).*

On appeal from the dismissal of the Morris case, a panel of the District of Columbia Court of Appeals considered itself bound by *Lindsay* and therefore affirmed, suggesting that plaintiffs seek a rehearing *en banc* so that the court could "address more fully" the contention that *Lindsay* should be reexamined. *Morris v. Providence Hospital,* No. 82-182 (D.C. Ct. App. Jan. 31, 1983). The D.C. Court of Appeals sitting *en banc* denied rehearing, however, on the ground that "the issue presented is one of interpretation of a federal statute thus precluding a question of local law construction." *Morris v. Providence Hospital,* No. 82-182 (D.C. Ct. App. March 16, 1983). No petition for certiorari from this *en banc* decision was filed.

Plaintiffs oppose defendant's motion on both grounds. They contend that the *merits* of this litigation have never

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*In *Lindsay,* an employee of defendant hospital was injured while on the job and was treated for his injury by the hospital. His injuries were much less serious than plaintiffs' here, but he also sued the hospital for malpractice. In affirming a grant of summary judgment for the hospital, the Court of Appeals stated that the exclusivity clause of the workmen's compensation statute was not avoided by "the fortuity that the employer . . . also operated the hospital where the professional services complained of were rendered." *Id.* at 821.

been heard or decided by any court, so that *res judicata* doctrines are inapplicable. This response is accurate.

As to federal question jurisdiction, plaintiffs point out that the D.C. Workmen's Compensation Act of 1928 adopted the identical language of the federal Longshoreman and Harbor Workers' Compensation Act, 33 U.S.C. § 905(a). They cite *Del Vecchio v. Bowens,* 296 U.S. 280, 281-282 (1935), for the proposition that issues involving the District of Columbia Workmen's Compensation Act are federal questions because their resolution sets nationwide precedent for the identical federal Act. Plaintiffs further point to the order of the D.C. Court of Appeals denying them rehearing, essentially because the case raised a federal question. Thus plaintiffs argue that federal jurisdiction in this case is proper and in fact required.

In the present posture of this case, it may be assumed that there is a federal question and that, in declining to address it, the local Appeals Court preserved the underlying merits for consideration when and if the precedential question is settled. *Res judicata* is therefore no bar. But *Lindsay* is. At oral argument the parties conceded, and the Court has determined, that plaintiffs' case cannot be distinguished from *Lindsay* and that *Lindsay* is dispositive of their claim. The original D.C. Court of Appeals panel hinted that *Lindsay* might merit reconsideration; *see also Tatrai v. Presbyterian University Hospital,* 439 A.2d 1162 (Pa. 1982) (concurring majority opinion) (adopting "dual capacity" theory to permit recovery by employees against employers not acting as employers at the time of injury); *D'Angona v. County of Los Angeles,* 27 Cal. 3d 661, 613 P.2d 238 (1980) (same); *Guy v. Arthur H. Thomas Co.,*378 N.E.2d 488 (Ohio 1978) (same). The *en banc* court's reaction indicates an expectation that such requests for reconsideration should be addressed to the federal

Court of Appeals that decided *Lindsay*. In any case, *Lindsay* is binding on this Court. On its authority, the accompanying Order will grant defendant's motion for summary judgment and dismiss the complaint.

Date: June 22, 1983 /s/ Louis F. Obendorfer
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CHARLES P. MORRIS, *et al.*,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Civil Action
	)	No. 83-1314
PROVIDENCE HOSPITAL,	)	
	)	
Defendant.	)	
	)	

ORDER

For reasons stated in the accompanying Memorandum, it is this 22d day of June, 1983, hereby

ORDERED: that defendant's motion for summary judgment is GRANTED: and it is further

ORDERED: that the complaint should be and is hereby DISMISSED.

/s/ Louis F. Obendorfer
UNITED STATES DISTRICT JUDGE

FILED
JUNE 22, 1983
CLERK, U.S. DISTRICT COURT
DISTRICT OF COLUMBIA

APPENDIX C

DISTRICT OF COLUMBIA COURT OF APPEALS
500 Indiana Avenue, N.W.
Washington, D.C. 20001
(202) 638-7113

No. 82-182
CHARLES P. MORRIS, ET AL., Appellants,

v. CA 9449-81

PROVIDENCE HOSPITAL, Appellee.

BEFORE: Newman, Chief Judge; Kern, Nebeker, Mack, Ferren, Pryor, Belson, and Terry, Associate Judges.

ORDER

On consideration of appellants' motion for reconsideration in support of petition for rehearing en banc, it is

ORDERED that appellants' motion for reconsideration is denied.

PER CURIAM

Copies to:

Honorable Sylvia Bacon

Clerk, Superior Court

Mark J. Brice, Esq.
2020 K Street NW, #840
Washington, DC 20006

Walter J. Murphy, Jr., Esq.
Wheaton Plaza North Building, #703
Wheaton, MD 20902

DISTRICT OF COLUMBIA
COURT OF APPEALS
FILED
APR 14 1983
xxxxxxxxxx
Clerk

DISTRICT OF COLUMBIA
COURT OF APPEALS

No. 82-182
CHARLES P. MORRIS,
AND HENRIETTA MORRIS, Appellants,

v. CA 9449-81

PROVIDENCE HOSPITAL, Appellee.

BEFORE: Newman, Chief Judge; Kern, Nebeker, Mack, Ferren, Pryor, Belson, and Terry, Associate Judges.

ORDER

On consideration of the petition for rehearing en banc and the ensuing pleadings relating thereto, and it appearing to the court that the issue presented is one of interpretation of a federal statute thus precluding a question of local law construction, it is

ORDERED that the aforesaid petition is denied.

PER CURIAM

Copies to:

Honorable Sylvia Bacon

Clerk, Superior Court

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DISTRICT OF COLUMBIA
COURT OF APPEALS
FILED
MAR 16 1983
xxxxxxxxxxx
Clerk

APPENDIX D

DISTRICT OF COLUMBIA COURT OF APPEALS

No. 82-182

CHARLES P. MORRIS, et al.,
Appellants,

v. CA 9449-81

PROVIDENCE HOSPITAL,
Appellee.

Appeal from the Superior Court of the
District of Columbia
Civil Division
(Hon. Sylvia Bacon, Trial Judge)

(Argued January 20, 1983 Decided January 31, 1983)

Before KERN, NEBEKER and FERREN, *Associate Judges.*

MEMORANDUM OPINION AND JUDGMENT

Appellant injured his back in April 1980, in the course of his employment as a chauffeur for Providence Hospital. Immediately following the injury, and for several weeks thereafter, appellant received treatment at the Employees Health Dispensary of Providence Hospital. During the course of appellant's treatment, his condition worsened, surgery was required (but was unsuccessful), and appellant is now partially paralyzed.

Appellant and his wife brought suit against Providence Hospital in June 1981, alleging malpractice in the treatment of his back injury, and claiming, *inter alia,* loss of consortium for his wife. Their suit was dismissed by the

trial court on the authority of *Lindsay v. George Washington University,* 2798 F.2d 819 (D.C. Cir. 1960), which held on similar facts that a suit against the employer for damages, in addition to workmen's compensation, is barred by the exclusive liability provisions of the D.C. Workmen's Compensation Act.[1]

The parties are agreed that this case is not significantly distinguishable from the *Lindsay* case and therefore that *Lindsay* is controlling precedent. However, appellant argues that the *Lindsay* decision is unjust to an employee in circumstances where the injury results from acts of the employer which are independent from and unrelated to the employer-employee relationship. Appellant urges that court to adopt the "dual capacity" doctrine applied in other jurisdictions to permit recovery against an employer for injuries incurred in transactions where the employer was acting, not as employer, but as a separate "third" person.[2] *E.g., Duprey v. Shane,* 39 Cal.2d 781, 249 P.2d 8 (1952); *D'Angona v. County of Los Angeles,* 27 Cal.2d 661, 613 P.2d 238 (1980); *Guy v. Arthur H. Thomas Co.,* 55 Ohio St.2d 183, 378 N.E.2d 488 (1978); *Tatria v. Presbyterian University Hospital,* 439 A.2d 1162 (Pa. 1982); *see* 2A A. Larson, Larson's Workmen's Compensation Law, §§ 72.61(c), 72.81 (1982).

However, under *M.A.P. v. Ryan,* 285 A.2d 310 (D.C. 1971), we may not refuse to follow such a controlling prior

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[1]Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 901, *et. seq.*, as made applicable to the District of Columbia by D.C. Code § 36-501 (1973 ed.). 33 U.S.C. § 905 provides that the liability of an employer as prescribed by the Act "shall be exclusive and in place of all other liability of such employer to the employee. . . ."

[2]33 U.S.C. § 933 describes a third party as "some person other than the employer or a person or persons in his employ."

opinion of the United States Court of Appeals for the District of Columbia Circuit except by decision of the full court sitting en banc. Thus, we are constrained to affirm the trial court's dismissal of appellant's suit. Of course, appellant may wish to use his petition for hearing en banc as a petition for rehearing en banc; and appellee may then file a response thereto. The full court may then consider the need to address more fully the contentions in light of the division's holding that *Lindsay* is controlling.

Accordingly, it is ORDERED and ADJUDGED that the judgment on appeal herein is affirmed.

FOR THE COURT:

/s/ Alan I. Herman
Alan I. Herman, Clerk.

Copies to:

Honorable Sylvia Bacon

Clerk, Superior Court

Mark J. Brice, Esq.
2020 K Street NW, #840
Washington, DC 20006

Walter J. Murphy, Jr., Esq.
Wheaton Plaza North Building, #703
Wheaton, MD 20902

DISTRICT OF COLUMBIA
COURT OF APPEALS
FILED
JAN 31 1983
/s/ Alan I. Herman
Clerk

APPENDIX E

DISTRICT OF COLUMBIA COURT OF APPEALS
500 Indiana Avenue, N.W.
Washington, D.C. 20001
(202) 638-7113

No. 82-182
CHARLES P. MORRIS, ET AL., Appeliants,

v. CA 9449-81

PROVIDENCE HOSPITAL, Appellee.

BEFORE: Newman, Chief Judge; Kelly, Kern, Nebeker, Mack, Ferren, Pryor, Belson, and Terry, Associate Judges.

ORDER

On consideration of appellants' petition for hearing en banc and it appearing that the majority of the judges of this court has voted to deny the petition, it is

ORDERED that appellants' petition for hearing en banc is denied.

PER CURIAM

Copies to:

Mark J. Brice, Esq.
2020 K Street NW, #840, 20006

Walter J. Murphy, Jr., Esq.
Wheaton Plaza North Building, #703
Wheaton, MD 20902

DISTRICT OF COLUMBIA
COURT OF APPEALS
FILED
NOV 10 1982
/s/ Alan I. Herman
Clerk

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 83-1779 September Term, 1983

CHARLES P. MORRIS, et al., Appellants
Civil Action No. 83-01314

v.

Providence Hospital

And Consolidated Case No. 83-1786

BEFORE Robinson, Chief Judge; Wright, Tamm, Wilkey, Wald Mikva, Edwards, Ginsburg, Bork, Scalia and Starr, Circuit Judges and Friedman,* Circuit Judge, United States Court of Appeals for the Federal Circuit

ORDER

The Suggestion for Rehearing *en banc* of Appellants Morris, et al., has been circulated to the full Court and no member has requested the taking of a vote thereon. On consideration of the foregoing, it is

ORDERED by the Court *en banc* that the aforesaid Suggestion is denied.

Per Curiam

For the Court:

GEORGE A. FISHER, Clerk

BY: /s/ Robert A. Bonner
Robert A. Bonner
Chief Deputy Clerk

*Sitting by designation pursuant to Title 28 U.S.C. § 291(a).

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 83-1779 September Term, 1983

CHARLES P. MORRIS, et al., Appellants
Civil Action No. 83-01314

v.

Providence Hospital

And Consolidated Case No. 83-1786

BEFORE Edwards and Scalia, Circuit Judges, and Friedman, Circuit Judge, United States Court of Appeals for the Federal Circuit

ORDER

On consideration of the Petition for Rehearing of Appellants Morris, et al., filed April 26, 1984, it is

ORDERED that the aforesaid Petition for Rehearing is denied.

Per Curiam

For the Court:

GEORGE A. FISHER, Clerk

BY: /s/ Robert A. Bonner
Robert A. Bonner
Chief Deputy Clerk

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*Sitting by designation pursuant to Title 28 U.S.C. § 291(a).

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 83-1779 September Term, 1983

CHARLES P. MORRIS,

Appellants

Henrietta Morris
Wife of Charles P. Morris

v.

Providence Hospital

AND CONSOLIDATED CASE No. 83-1786

BEFORE Robinson, Chief Judge; Wright, Tamm, Wilkey, Wald Mikva, Edwards, Ginsburg, Bork, Scalia and Starr, Circuit Judges

ORDER

The Suggestion for Initial Hearing *En Banc*, filed September 27, 1983, has been circulated to the full Court and no member has requested the taking of a vote thereon. On consideration of the foregoing, it is

ORDERED by the Court *en banc* that the aforesaid Suggestion for Hearing *En Banc* is denied.

Per Curiam

For the Court:
GEORGE A. FISHER, CLERK

BY: /s/ Daniel M. Cathey
First Deputy Clerk